

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2053-CR

Cir. Ct. No. 2013CF286

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE J. PRITCHARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Reversed and cause remanded for further proceedings.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Willie Pritchard appeals an amended judgment of conviction entered after a jury found him guilty of battery by a prisoner as a repeater, and an order denying his motion for postconviction relief. Pritchard

argues that he is entitled to a new trial because his trial counsel rendered ineffective assistance by failing to object to the State's use of inadmissible character evidence at trial, both in questioning a witness and in its closing argument.¹ We conclude that the evidence at issue was inadmissible character evidence under WIS. STAT. § 904.04(1), that Pritchard's trial counsel performed deficiently in failing to object to the unambiguous uses that the State made of it, and that Pritchard's defense during the short trial here was prejudiced as a result. On this basis, we conclude that trial counsel provided ineffective assistance and, accordingly, we reverse.

BACKGROUND

¶2 The State filed a criminal complaint charging Pritchard with battery by a prisoner as a repeater, based on allegations that Pritchard struck Correctional Officer B.B. once in the face with his elbow while B.B. was part of a group of officers escorting Pritchard back to his cell at Dodge Correctional Institution.

¶3 At the jury trial, the evidence established the following undisputed facts. Pritchard walked out of his cell at a time when he was not physically restrained in any way and had not received permission to leave his cell. Correctional officers were called to restrain Pritchard and escort him back to his

¹ Pritchard also argues that the evidence at issue was inadmissible other acts evidence, *see* WIS. STAT. § 904.04(2) (2013-14), and that its use violated the circuit court's pretrial order in limine generally prohibiting other acts evidence. Because we reverse based on ineffective assistance of counsel, we do not address Pritchard's other acts argument.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

cell. A captain called to assist in this effort testified that he obtained a Taser based on his experience and prior dealings with Pritchard.

¶4 Specifically, the captain testified as follows:

[Prosecutor:] Okay. At what point do you get involved?

[Captain:] I got involved after I was made aware that Mr. Pritchard had been accidentally released from a segregation cell.

[Prosecutor:] Okay. And when you, when you became aware of that information, what actions did you take?

[Captain:] I was in my office, which is at the opposite end of the institution, the lieutenant and I. I inquired as to who the inmate was. When I heard it was Mr. Pritchard, *because of past dealings with Mr. Pritchard I knew what precautions I had to take.* I told my lieutenant to go down and address the situation. *I went to the institution armory on Unit 18 and obtained the Taser.*

[Prosecutor:] *You felt that you may need the Taser?*

[Captain:] *Yes, sir, and that was based on past experience I've had with the individual.*

(Emphasis added.)

¶5 Between five and fifteen minutes after Pritchard left his cell, when the captain arrived with the Taser, Pritchard's arms were handcuffed and connected to a waist chain behind his back, and four officers, including the captain, began to escort Pritchard back to his cell, which involved walking up a wide set of stairs. Officer B.B. was one stair step immediately behind and below Pritchard. When the group was about halfway up the stairs, Pritchard's elbow came back. The officers then brought Pritchard to the ground.

¶6 The officers and Pritchard offered different accounts of what took place at the critical moment when, and immediately after, Pritchard's elbow came

back, with the group about halfway up the stairs. The officers testified that Pritchard threw his elbow at B.B. and struck B.B. in the face, and then the officers lowered Pritchard to the ground. B.B. testified that he was struck in the face, suffering “a minor cut on the inside of [his] lip.” Pritchard testified that his arm went out “close” to B.B. when Pritchard’s knee, which had been hurting, “popped” as the officers were escorting him faster up the stairs than he could move. Pritchard testified that B.B. “jerked back” only after Pritchard was already going down, and that Pritchard neither struck B.B. nor intended to strike B.B.

¶7 The State presented a video recording showing one angle of the incident on the stairs, which the jury viewed once during trial and twice during its deliberations.

¶8 In a short closing argument, the prosecutor recounted how Pritchard would not let the officers put him in restraints to escort him back to his cell and then highlighted for the jury, “And then what happens is ... [the captain] shows up and [the captain] indicates he has prior experience with Mr. Pritchard but he shows up with a Taser.”

¶9 We will generally refer to the captain’s testimony recounted in ¶4 above, along with the prosecutor’s highlighting that testimony in the closing argument as set forth in ¶8, as “the Taser references.”

¶10 The jury found Pritchard guilty as charged, after a trial that lasted approximately four hours. Pritchard filed a postconviction motion seeking a new trial on several grounds, including that the Taser references were inadmissible evidence of Pritchard’s character for violence and that Pritchard’s trial counsel provided ineffective assistance by failing to object to the Taser references. After an evidentiary hearing, the circuit court denied Pritchard’s motion for a new trial.

¶11 Pertinent to this appeal, the circuit court determined that the Taser references were inadmissible character evidence because the references conveyed the idea that Pritchard “is uncooperative and may require a threat or use of force to obtain compliance,” and that the court would have sustained an objection to that testimony.² The court assumed without deciding that Pritchard’s trial counsel was deficient in failing to make that objection. The court concluded that the error did not prejudice Pritchard based on the video recording of the incident, which in the court’s view “clearly refuted” Pritchard’s testimony that Pritchard did not intentionally swing his elbow back to strike Officer B.B., and that Pritchard did not believe that he had made contact with the officer’s face.

¶12 This appeal of the order denying Pritchard’s motion for a new trial followed.

DISCUSSION

¶13 Pritchard argues that he is entitled to a new trial because his trial counsel failed to object to the Taser references as inadmissible character evidence, and the erroneously admitted evidence was prejudicial to Pritchard’s defense. The State disagrees, based on sometimes shifting positions that we describe below.

¶14 We first conclude that the Taser references were inadmissible character evidence. We then conclude that Pritchard’s trial counsel performed deficiently in failing to object to the Taser references, and, based in part on the

² The State omitted this aspect of the circuit court’s ruling in its summary of the court’s decision in its brief on appeal. We remind counsel for the State that providing this court with a misleadingly selective summary of a circuit court’s statement on a topic is an unacceptable form of advocacy. When this was drawn to counsel’s attention at oral argument, counsel provided no reasonable explanation for this omission.

State's concession at oral argument, that Pritchard's defense was prejudiced as a result.

I. Inadmissible Character Evidence

¶15 Pritchard challenges the Taser references as inadmissible character evidence. The pertinent statutory language is as follows.

(1) Character evidence generally. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion

WIS. STAT. § 904.04(1); *see State v. Jackson*, 2014 WI 4, ¶46, 352 Wis. 2d 249, 841 N.W.2d 791. There are three exceptions to the prohibition on character evidence, none of which are applicable here. *See* WIS. STAT. § 904.04(1).

¶16 Pritchard argues that the Taser references conveyed the captain's opinion that Pritchard has a violent character and needs to be controlled, and were offered to "suggest that Pritchard had intentionally battered Officer B.B. because such conduct was in conformity with Pritchard's inferred, pre-existing character trait for violence." The State did not contest Pritchard's character evidence argument in its responsive brief. Indeed, the State effectively conceded the point when it asserted that the captain's "testimony about 'past experience' could be testimony regarding prior violence by Pritchard, but it could simply be a history of being uncooperative." Elaborating on this position at oral argument, the State characterized the Taser references as indicating that Pritchard was "uncooperative enough" that an officer should be armed with a Taser when attempting to restrain or escort him. Of course, being violent and being uncooperative are both character traits, and it was precisely on that basis that the circuit court concluded that the

testimony was inadmissible character evidence that Pritchard is “uncooperative and may require a threat or use of force to obtain compliance.”

¶17 At oral argument, the State argued that the Taser references, while character evidence, were not offered to show that Pritchard “acted in conformity therewith,” as required by WIS. STAT. § 904.04(1). Rather, according to the State, the testimony was offered to show “absence of mistake,” an exception to the prohibition against other acts evidence in WIS. STAT. § 904.04(2)(a). However, it is uncontested that the State did not at any time, either before or during trial, identify this as other acts evidence to the circuit court. Moreover, at oral argument, the State failed to present a developed argument that the Taser references were presented to the jury for the limited purpose of showing the absence of mistake. In short, nothing the State argued in oral argument negated its concession in briefing that the Taser references were inadmissible character evidence.

¶18 For these reasons, we conclude that the Taser references were inadmissible evidence that Pritchard has a violent character. We now turn to Pritchard’s argument that his trial counsel was ineffective for failing to object to the State’s use of this evidence.

II. Ineffective Assistance of Counsel

¶19 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel’s representation was deficient and that the deficiency prejudiced him. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court’s factual findings

unless they are clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel’s performance was deficient or prejudicial. *Jeannie M.P.*, 286 Wis. 2d 721, ¶6.

¶20 To prove deficient performance, Pritchard must show that, under all of the circumstances, counsel’s specific acts or omissions fell “outside the wide range of professionally competent assistance.” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). To prove prejudice, Pritchard must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

A. Deficient Performance

¶21 Pritchard argues that his trial counsel’s failure to object to the Taser references was deficient for three reasons: (1) none of the statutory exceptions to the prohibition against character evidence applied; (2) the Taser references undercut the defense theory that the alleged battery was an accident, based on the consistent testimony of Pritchard; and (3) counsel proffered no reasonable strategic reason for his failure to object, stating only that the Taser topic had not been disclosed by the State before trial, and that “it just went by me without any consideration.”

¶22 In response, the State argued in its briefing only that counsel was not deficient for failing to object to the Taser references because they were not other acts evidence and consequently did not violate the circuit court’s pretrial order in limine. *See supra*, n.1 At oral argument, the State merely repeated its position that the testimony was character evidence properly presented to show the absence of mistake, a position that we have rejected as explained above.

¶23 We conclude that Pritchard has shown that his trial counsel's performance was deficient.

B. Prejudice

¶24 Pritchard argues that the Taser references were prejudicial because they “unfairly put a figurative thumb onto the scale concerning [Pritchard’s] credibility” in a case that turned on the jury’s weighing Pritchard’s credibility vis-à-vis the credibility of the officers. Pritchard notes that there was no evidence that Pritchard was arguing or resisting while he was being restrained and escorted up the stairs before the moment of the alleged battery, and also no proof that Pritchard’s motive was to strike the officer. In addition, Pritchard notes that there was testimony that Pritchard’s movement was significantly restricted, and that Pritchard’s explanation based on knee pain was corroborated by his visit to a prison nurse the previous day.³

¶25 As to the video recording of the incident on the stairs, Pritchard argued in his principal brief on appeal that it did not unequivocally refute Pritchard’s testimony that he had moved his elbow backwards without an intent to strike the guard, or his testimony that he did not actually strike the guard. More

³ We note that Pritchard described his knee as swollen when he testified about his visit to the nurse, and that the nurse, who followed Pritchard as the last witness at trial, testified that the knee was “without ... swelling.” The State makes no mention of this discrepancy between Pritchard’s and the nurse’s testimony in any of its arguments, and we agree with the circuit court that for the purpose of the prejudice analysis, to the extent that the jury could have decided that Pritchard lied or exaggerated about the severity of a knee injury, that would likely have been overshadowed by the undisputed fact that he had reported a knee injury. As the circuit court stated, “the most important part of the nurse’s testimony was to corroborate the defendant’s statement that he had a sore knee on the date of the incident—whether it was swollen or not was of little import.”

specifically, in his brief, Pritchard described the video recording in detail as follows:

[T]he prison video recording unambig[u]ously establishes that Pritchard had stopped or paused before he ascended the stairs, that he was escorted up the stairway by several correctional officers while his arms were shackled behind his back, and that his elbow abruptly moved backward and one of the correctional officers quickly reacted away from his elbow. But the video recording is equivocal in other respects; it does not compel reasonable minds to agree that Pritchard's knee had been performing painlessly, that Pritchard's elbow had moved intentionally, or even that the elbow had made physical contact with Officer B.B.

¶26 In its response brief, the State simply suggested in cursory, conclusory fashion that the video recording is sufficiently conclusive to resolve any differences between the officers' testimony and Pritchard's testimony.

¶27 We have viewed the video recording and agree that Pritchard's summary is accurate, because to our eyes the recording could support some aspects of Pritchard's testimony and some aspects of the officers' testimony, and it is not conclusive on key points.⁴ Pritchard accurately describes the recording as showing, from some distance, the officers and Pritchard pausing at the bottom of the stairs, the officers and Pritchard moving up the stairs and the sudden extension of Pritchard's elbow, and an officer's body jerking back as Pritchard appears to be falling down. It is not clear from the recording that Pritchard did or did not intentionally throw out his elbow to strike the officer or that Pritchard's elbow

⁴ The State on appeal does not contest that this court has a vantage point equal to that of the circuit court in reviewing the video recording as part of our evaluation of the legal question as to whether the State's Taser references resulted in prejudice to Pritchard. *See State v. Jimmie R.R.*, 232 Wis.2d 138, 158, 606 N.W.2d 196 (Ct. App. 1999) (when the only evidence on a factual question is reflected in a video recording, the court of appeals is in the same position as the circuit court to determine a question of law based on the recording).

came into contact with the officer's face. The recording can be interpreted as being consistent either with the officers' testimony or with Pritchard's testimony.

¶28 At oral argument, the State changed its position on this issue, conceding that the pertinent details of the recording are "open to interpretation" and that the record "is not unequivocal" as to whether Pritchard's elbow hit Officer B.B. This concession directly undermines the primary rationale given by the circuit court in denying the postconviction motion.

¶29 In sum, whether Pritchard intentionally struck Officer B.B. with his elbow was disputed between Pritchard and the officers, and, as conceded by the State, what occurred at the critical moment is not clear from a viewing of the recording. The jury was exposed three separate times to the Taser references that clearly conveyed the notion that Pritchard has a propensity for violence or threats of violence, during a trial that lasted only four hours. And, the jury was given no instruction from the circuit court to the effect that it was to use this character evidence only for a limited, legitimate purpose, and not as propensity evidence. Finally, the State explicitly directed the jury's attention to the Taser references in its short closing argument. Thus, the final word that the jury heard on this topic invited jurors to use their imaginations to wonder how violent or threatening Pritchard had been, on how many different prior occasions, to have caused an officer to think that he needed to be armed with a Taser before approaching Pritchard. This emphasis on the topic by the State in closing makes it all the more difficult for us to be confident that jurors would have attached little significance to this aspect of the captain's testimony. We agree with Pritchard that, considering all pertinent facts, there was a reasonable probability that the inadmissible character evidence did affect the jury's weighing of the witnesses' credibility, and, accordingly, did contribute to the verdict.

CONCLUSION

¶30 For the reasons stated, we reverse the decision of the circuit court and remand the cause for a new trial.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

